SUPREME COURT OF THE UNITED STATES

HORACIO ALVARADO *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89-6985. Decided June 25, 1990

PER CURIAM.

At his criminal trial, petitioner claimed that the Government used certain peremptory challenges to remove black jurors solely on the grounds of race, contrary to *Batson* v. *Kentucky*, 476 U. S. 79 (1986). The District Court accepted the Government's explanations for its challenges, and petitioner was convicted. He pursued his *Batson* claim in the Court of Appeals, claiming that the the Government's explanations were pretextual. The Government asserted that petitioner had not made out a prima facie *Batson* error and that it had race-neutral reasons for each challenge. The Court of Appeals did not rule on these competing claims, for it held that no appellate inquiry was required into the merits of a *Batson* claim if the jury finally chosen represented a fair cross section of the community, as did this jury. The conviction was affirmed.

Petitioner, seeking certiorari, urges that the Court of Appeals relied on an erroneous ground in rejecting the *Batson* claim. The United States agrees that the Court of Appeals erred in holding that as long as the petit jury chosen satisfied the Sixth Amendment's fair cross-section concept, it need not inquire into the claim that the prosecution had stricken jurors on purely racial grounds. That holding, the Government states, is contrary to *Batson* and is also discredited by our decision in *Holland* v. *Illinois*, 493 U. S. —— (1990), which held that the fair cross-section requirement of the Sixth Amendment did not apply to the petit jury and which was handed down after the Court of Appeals issued its opinion below. The Government urges us to deny certiorari, how-

ever, because petitioner failed to make out a prima facie case of intentional discrimination and because the reasons given for the challenges were race-neutral, grounds for decision that the Court of Appeals did not reach.

When the Government has suggested that an error has been made by the court below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court. See, *e. g.*, *Biddle* v. *United States*, 484 U. S. 1054 (1988); *Malone* v. *United States*, 484 U. S. 919 (1987). Nor is it novel to do so in a case where error is conceded but it is suggested that there is another ground on which the decision below could be affirmed if the case were brought here. Indeed, a case decided earlier this Term presented such a situation and, without dissent, we vacated the judgment below for reconsideration in light of the position asserted by the Solicitor General in this Court. *Chappell* v. *United States*, 494 U. S. —— (1990). This is the appropriate course to follow in this case. If the judgment below rested on an improvident ground, as the Government suggests, the Court of Appeals should in the first instance pass on the adequacy of the Government's reasons for exercising its peremptory challenges.

Consequently, the motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed May 21, 1990.

It is so ordered.